

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
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OFFICE OF THE CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RANDALL S. KRAUSE,
Plaintiff,

v.

CITY OF OMAHA,
Defendant.

8:15cv197

**REPLY BRIEF OPPOSING
MOTION TO DISMISS**

ARGUMENT

It is important to recognize what the Defendant ("the City") is engaged in by performing snow and ice control. Snow and ice control performed by the City is a manufacturing process called coating. The City coats the roads with chemicals to produce road surfaces that are safe to drive on during winter weather events. The City primarily uses rock salt as a coating, either in crystalline form or dissolved in a brine solution. Sodium chloride and sodium ferrocyanide ("the chemicals") are the main components of the rock salt the City uses. Sodium chloride lowers the freezing point of water, allowing snow and ice to melt at temperatures below 32° Fahrenheit. By melting snow and ice, the City breaks the ice-pavement bond, allowing greater friction between tires and the road. Sodium ferrocyanide is an anti-caking agent that keeps rock salt crystals from sticking together, making them easier to handle and spread. The City applies the chemicals to the pavement with trucks equipped with special equipment. The final product is a road surface that allows motorists to travel safely at a reasonable speed.

By melting snow and ice, the City creates runoff that disposes of the chemicals. Runoff carries the chemicals off the streets. See 78 Fed. Reg. 48954-55 (Aug. 12, 2013), and see US v. Plaza Health Laboratories, 3 F.3d 643, 652 (2d Cir. 1993), (Oakes, J., dissenting). The sodium chloride and sodium ferrocyanide that sit on the dirt shoulders of Carter Lake Shore Dr. W and Carter Lake Shore Dr. N ("the streets") were

deposited there by runoff. For safety reasons, the City designed the streets to drain runoff to the dirt shoulders. Once the chemicals are on the dirt shoulders, they can no longer serve their intended purpose and they are abandoned. The chemicals become waste by-products of the coating process.

Unless they are excluded by the statute, materials that have been disposed of or abandoned constitute solid waste within the meaning of the Resource Conservation and Recovery Act ("RCRA"). American Mining Congress v. U.S. EPA, 824 F.2d 1177, 1193 (D.C. Cir. 1987). Runoff disposes of the chemicals and then the City abandons them on the side of the road. Because the chemicals are not abandoned or disposed of in the form of domestic sewage, irrigation return flows, industrial discharges, or nuclear waste, they are not excluded from being solid waste under RCRA. See 42 U.S.C. § 6903(27).

Classifying the chemicals as solid waste under RCRA after they have served their intended purpose is consistent with Congressional intent because RCRA was meant to "cover[] 'waste by-products of the nation's manufacturing processes.'" Ecological Rights Foundation v. Pacific Gas and Elec. Co., 713 F.3d 502, 515 (9th Cir.2013), quoting H.R. Rep. No. 94-1491(1), at 2 (1976). RCRA defines solid waste as discarded materials, and "the term discarded materials [in RCRA] is used to identify collectively those substances often referred to as industrial, municipal or post-consumer waste; refuse, trash, garbage and sludge." *Id.* Abandoned chemicals on the side of the road can easily be seen as discarded materials.

The sodium chloride and sodium ferrocyanide that sit on the dirt shoulders of the sections of Carter Lake Shore Dr. W and Carter Lake Shore Dr. N that are in a floodplain are solid waste under RCRA because they are waste by-products of a manufacturing process that have been disposed of and abandoned. The City is guilty of open dumping under 42 U.S.C. § 6945(a) and 40 CFR § 257.3-1(a) because the City's coating process is responsible for generating the solid waste.

Date: July 20, 2015



Randall S. Krause
604 S. 22nd St. Apt. 515
Omaha, NE 68102
Telephone No. (402) 206-7045
Email: krause_randall@hotmail.com

Certificate of Service

I certify that on July 20, 2015, I mailed a true and accurate copy of the foregoing REPLY BRIEF OPPOSING MOTION TO DISMISS by United States Postal Service, postage prepaid, to Ryan J. Wiesen at 1819 Farnam St., Suite 804, Omaha, NE 68183.

